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No. 81-31

IN THE

# Supreme Court of the United States

## October Term, 1981

GRACE BRETHREN CHURCH and
REVEREND DAVID L. HOCKING, etc., et al.,
*Appellees,*

*v.*

STATE OF CALIFORNIA, CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, DIRECTOR OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT,
*Appellants.*

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THE LUTHERAN CHURCH-MISSOURI SYNOD, a Nonprofit Membership Corporation on Behalf of 85 Member Lutheran Churches, etc., et al.,
*Appellees,*

*v.*

THE STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, THE DIRECTOR OF THE CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT,
*Appellants.*

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**On Appeal From the United States District Court for the Central District of California.**

## MOTION TO AFFIRM

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## COUNTERSTATEMENT OF QUESTION PRESENTED

The District Court made findings of fact, based upon evidence unchallenged upon the trial, and conclusions of law, based upon the statute, that the benefit eligibility provisions of the California Unemployment Insurance Code, when applied to religious schools, create entanglements between government and religious bodies forbidden by the Establishment Clause of the First Amendment. Does the appeal from that judgment raise any substantial question not previously decided by the Supreme Court?

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THE LUTHERAN CHURCH-MISSOURI SYNOD, a nonprofit membership corporation on behalf of 85 member Lutheran Churches, etc., *et al.*,

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THE STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, THE DIRECTOR OF THE CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT,

*Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

## MOTION TO AFFIRM

The appellees Grace Brethren Church and Reverend David L. Hocking, its pastor; Calvary Cross Church of the Highlands and Reverend Donald B. Sheeley, its pastor; Scott Memorial Baptist Church and Reverend Tim Lahaye, its pastor; Christian Unified Schools of San Diego; Redwood Christian Schools; Sidney Bowen and Patricia Bowen, his wife; Peter Farrelly and Sue Farrelly, his wife; William Tschantz and Janet Tschantz, his wife; Arthur Brandwood and Cheryl Brandwood, his wife; Stanley Edington; R. Florence Murti; and R. Suzanne Royer, respectfully move to affirm the judgment of the United States District Court for the Central District of California entered April 6, 1981, insofar as that judgment is challenged by this appeal.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are correctly set forth in the Jurisdictional Statement.

## COUNTERSTATEMENT OF THE CASE

Three types of religious organizations are involved in this case:

1. The religious schools (not separately incorporated) operated by the appellees Grace Brethren Church and Calvary Cross Church of the Highlands.

2. The religious schools (separately incorporated) operated by the appellee Scott Memorial Baptist Church (these schools also being the appellee Christian Unified Schools of San Diego).

3. The religious schools (separately incorporated and held by the court below to be not operated by any church or convention or association of churches) known as Redwood Christian Schools, an appellee here.

In their complaint herein the appellees raised statutory and constitutional objections to the imposition of the California Unemployment Insurance Code upon the appellee institutions. Count III of the complaint specifically attacked the benefit determination provisions of the Code as necessitating excessive entanglements between government and religious entities. Upon trial in the District Court, the defendant United States Department of Labor presented, as expert witnesses, two employees of the Department who testified at length with respect to the benefit determination process. T. 153-282.[1] The witness Ernest L. Carter identified himself as "an unemployment insurance program specialist" who furnishes "technical assistance to the states interpreting federal law, federal requirements in unemployment insurance." *Id.* at 154. The witness stated that he was involved in "determina-

1. Transcript, August 13, 1980.

tions of eligibility under state law regarding discharge [and] refusals of employment." *Id.* at 155. Testifying that the unemployment insurance program is a "federal-state program", he stated that it was the job of his office "to ensure that the state agencies comply with the federal standards" with respect to benefit determinations. *Id.* at 160. Counsel for the federal goverment asked the witness a series of questions as to how determinations are made where the employee of a religious school is discharged on religious or moral grounds. Extensive cross-examination followed. The federal government's second witness was Bernard Streett, Supervisor of the Appeals Unit for Unemployment Insurance Service, Employment and Training Administration, U. S. Department of Labor. He testified "as an expert on the issue of the federal standards for adjudication of claims in formal hearings before state unemployment insurance agencies." *Id.* at 227. He stated that it is the function of his office "to monitor the nature of the hearing processes that take place in the states and how those processes function." *Id.* at 225. His testimony then dealt extensively with the application of federal guidelines to cases (in the states) involving benefit determinations where employees of religious schools are discharged on religious or moral grounds. *Id.* at 232-282.

At no time did the State of California object to the questions propounded to these witnesses; nor did California offer any witnesses in order to present testimony to show that the benefit determination processes in California differ significantly from those contained in the federal guidelines, in particular in respect to cases involving employees discharged from religious schools.

The District Court looked to the terms of the applicable federal and California statutes, 26 U. S. C. § 3304(a)(10) and § 1256 of the California Unemployment Insur-

ance Code, noting that, by their terms, "an employee . . . is disqualified from receiving the benefits to which he would otherwise be entitled if he is discharged for misconduct." Jurisdictional Statement, App. A. 26. The court found the resulting "involvement of secular officials in religious disputes" (in benefit determination processes relating to religious schools) to be "inevitable". *Id.* at 30. The court found confirmation of this in the aforementioned testimony of the federal expert witnesses. *Id.* at 27-30. The District Court thus concluded that the Establishment Clause, due to excessive entanglements, bars the application to religious schools of the unemployment compensation tax scheme. *Id.* at 33.

## ARGUMENT

This case presents no substantial question which has not been previously decided by this Court. Under prior decisions of this Court, the decision of the District Court was eminently correct.

Appellants argue: (1) that the evidence produced at trial does not support the District Court's finding of excessive entanglements arising from the benefit eligibility determination process. *Id.* at 13. (2) That "the church group appellees' objections to the benefit eligibility determination process are purely speculative" (in relation to forbidden entanglements) in light of certain decisions of the Supreme Court. *Id.* at 14-22.

1. Appellants are tardy in attempting to improve, from their point of view, the trial record. The unemployment compensation program is a federally controlled program.[2] Upon the trial the federal government presented expert testimony to show how the Department of Labor considers the benefit determination process to work in all fifty states and how the Department furnishes training to state unemployment compensation officials in the requirements of federal law—and in particular with respect to the benefit determination process. T. 153-282.

The appellants did not object to this testimony. The appellants, with full opportunity to do so, presented no

2. The United States Secretary of Labor is required to approve the law of any state participating in it, 26 U. S. C. § 3304(a), and each year he must certify to the Secretary of the Treasury each state whose law he has previously approved (26 U. S. C. § 3304(c)), and can decertify any state which has failed to comply with certification requirements. 26 U. S. C. § 3304(c), (d). Credit against the federal tax imposed by the Federal Unemployment Tax Act, for contributions made to state unemployment compensation funds, is dependent upon the aforementioned federal certification. 26 U. S. C. § 3302(a).

evidence whatever to show that California conducts the benefit determination process outside the federal guidelines and in ways which can involve no forbidden entanglements. The appellants complain that the federal expert witnesses had never *personally* conducted a benefit eligibility hearing involving a church employee. But the appellants, upon the trial, never raised a question as to the relevance, expertise or competency of the testimony of those witnesses.

The District Court most justifiably relied in part upon the federal experts' testimony. Jurisdictional Statement, App. A, 27-29. But it based its conclusion respecting entanglement *also* upon what it regarded as the "*inevitable*" effect of the operation of the statute. So far, therefore, as appellants complain that the record evidence does not support the District Court's conclusion they raise a matter of no substance whatsoever.

Appellants, in this part of their argument, also seek to make it appear that appellees have challenged solely the "tax side" of the program (imposition of the unemployment insurance tax) and not the "award of benefits" side (determination of benefits eligibility). Appellees then argue that the former "side" should be considered independently of the latter "side"; hence, so they say, the Court should disregard the potential constitutional questions which benefit determination proceedings might pose where church-related school employees are involved. Jurisdictional Statement, 14-16. The complaint, however, challenged the imposition of the statute upon the religious entities *in its every aspect*, and the District Court recognized that and likewise properly dealt with both "sides" of the statute. This argument of appellants plainly raises no question of substance.

2. Finally, appellants argue that no excessive entanglements are necessitated in the statutory benefit eligibility

determination process because whether an employee was discharged for misconduct would depend simply upon whether he or she knowingly failed to abide by an "established work rule" (which could incorporate religious requirements). The inquiry in such case would be "purely secular" (what was the "work rule" and was it knowingly violated?). The church property cases (*Jones v. Wolf*, 443 U. S. 595 (1979), etc.), so appellants argue, permit precisely that kind of inquiry. Jurisdictional Statement, 16-22.

Appellants' attempt to reduce to a "work rule" the requirements of religious faith (in the setting of an employment by a religious ministry) calls for a vast oversimplification of the factors involved.[3] The District Court pointed to the two prime defects of this approach:

3. In footnote 5 of the Jurisdictional Statement at Page 17, appellants point to Title 22 of the California Administrative Code, Section 1256-36(b)(1), which lists a series of situations in which an employee is *not* required to comply with a "work rule" regardless of its terms. The prospect of these situations but broadens the vista of unconstitutional entanglements necessarily presented by the application of the statute to religious ministries. For example, under Situation 2, in the footnote, the employee's noncompliance with the "work rule" would be based on its imposing "a new and unreasonable burden upon the employee." If that burden consisted of a religious duty, the state would determine whether that religious duty was an "unreasonable" burden. Similar potential entanglements are found in Situations 3, 5 and 6. In the hope of avoiding the entanglement issue, the appellants are careful to state that "the context in which an employee is not required to comply with a work rule under the above regulation is determined solely according to secular standards." This makes the effect even worse constitutionally: if the religious ministry insists that the "work rule" is not unreasonable because it is religiously required, the state may not hear of that: it must apply solely "secular standards"—thus effectively wiping out the religious claim.

"First, it underestimates the complexity of religious faith. In effect, the Secretary's approach requires religious schools wishing to make adherence to religious doctrine a condition of employment to develop and explain to prospective employees detailed, all-encompassing articles of religious belief. Such a task could never be accomplished. It should be obvious that not all doctrinally-based 'implied work rules' can be prescribed in advance; nor can religious ideals like 'fervor,' which may be satisfied or breached by infinitely varied patterns of conduct, be precisely defined.

"Second, the adoption of a rule making the employee's subjective understanding of his employment terms decisive would embroil the hearing examiner in credibility questions which can only be resolved by involvement in religious issues. For example, the fundamentalist school principal confronted with a claim by a teacher fired for advocacy of a particular doctrine or practice that his understanding of fundamentalist doctrine did not require opposition to that doctrine or practice might well wish to challenge the credibility of the teacher's assertion by establishing that such opposition *really is* mandated by fundamentalist doctrine and that alleged ignorance of that fact *must* be feigned. Similarly, a teacher fired ostensibly for religious reasons might wish to show that the religious reasons advanced for the discharge were a pretext by showing that the reasons asserted were not an accurate statement of the tenets of fundamentalist faith. In short, there are so many ways in which doctrinal questions could become material to benefit eligibility determinations that decisions on religious issues by secular administrators is, in this Court's opinion, inevitable if fundamentalist schools

> typified by some of the plaintiffs in the Grace Brethren case are subjected to the benefit determination process." A. 29-30.

To be noted here is the warning of the Supreme Court respecting the right of religious bodies to "establish their own rules and regulations for internal discipline and government . . ." *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U. S. 696, 724 (1976).

The District Court's conclusion, that the benefit eligibility determination process inevitably involves secular officials in religious disputes and thus "runs afoul of the constitutional prohibition against excessive entanglement between the state and religion", is the most obvious of conclusions arising out of the now settled principles laid down in this Court's decisions on church-state separation (*e.g.*, *Walz v. Tax Commission*, 397 U. S. 664 (1970); *Lemon v. Kurtzman*, 403 U. S. 602 (1971); *Serbian Eastern Orthodox Diocese v. Milivojevich*, *supra*). No further review of the District Court's decision is conceivably warranted.

## CONCLUSION

Wherefore, appellees respectfully submit that appellants present no substantial question for the decision of this Court, and that the judgment of the District Court should be affirmed.

Respectfully submitted,

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